

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

MARGATE TOWERS CONDOMINIUM  
ASSOCIATION, INC.

Employer

and

Case 4–RC–20486

INTERNATIONAL UNION OF  
OPERATING ENGINEERS,  
LOCAL 68, AFL-CIO

Union

**REGIONAL DIRECTOR’S DECISION AND ORDER**

The Employer, Margate Towers Condominium Association, manages a residential condominium facility in Margate, New Jersey. The Union, Operating Engineers Local 68, was certified on September 16, 2002 as the exclusive bargaining representative of a unit of the Employer’s maintenance employees. On October 10, 2003, the Employer filed with the undersigned Regional Director a request to revoke the Union’s certification, asserting that the bargaining unit had been permanently reduced to a single employee and was therefore inappropriate for the purposes of collective bargaining. On November 23, 2003, an Order issued denying the Employer’s request. The Employer filed a Request for Review of this denial, and, on March 25, 2004, the National Labor Relations Board issued a Notice To Show Cause, giving the parties an opportunity to address “why the Regional Director’s Order should not be reversed and the Employer’s motion to revoke the Petitioner’s certification should not be granted.” The Union filed a response to the Notice to Show Cause. Thereafter, on June 10, 2004, the Board issued an Order remanding the case for a hearing on the issue of whether the unit has been permanently reduced to one employee and for further appropriate action.

The Employer asserts that the only employee in the unit is Maintenance Technician Randy Mortimore, and that Maintenance Supervisor David Meranus is not part of the unit because he is a supervisor within the meaning of Section 2(11) of the Act. The Union contends that the Employer has failed to demonstrate that the unit has been permanently reduced to one employee. In this connection, the Union contends that the Employer has recently placed a newspaper advertisement seeking to hire additional unit employees. The Union further contends that, even if the Employer had demonstrated that the unit was permanently reduced to one employee, the circumstances do not warrant revocation of its certification. The Union has not taken a position on whether Meranus is a supervisor.<sup>1</sup>

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<sup>1</sup> The Union declined to stipulate that Meranus is a supervisor but did not address his supervisory status in its brief.

A Hearing Officer of the Board held a hearing, and the parties filed briefs. After considering the evidence and the arguments presented by the parties, I find that the Maintenance Supervisor is a supervisor within the meaning of the Act, the unit has been permanently reduced to a single employee, and the Union's Certification of Representative should be revoked.

To provide a context for my discussion, I will first present an overview of the Employer's operations. Then, I will review the factors to be considered in determining whether an employee is a supervisor under Section 2(11) of the Act and whether the Union's certification should be revoked. Finally, I will present in detail the facts and reasoning that support my conclusions.

## **I. OVERVIEW OF OPERATIONS**

The Employer manages a 43-year-old, 11-story condominium building in Margate, New Jersey. The first floor has both public and commercial space, and the remaining 10 floors consist of 181 private residential living units. The facility also has three parking lots, a two-level parking deck, and a swimming pool.

The Employer is operated by a seven-member Board of Directors, which is led by a President. General Manager Roxanne Mellow, who was hired in November 2002, oversees the day-to-day operation of the facility. She is responsible for the maintenance and security of the condominium units and common areas. The Employer outsources elevator maintenance, security, lifeguarding, and housekeeping work to private contractors. Mellow reports directly to the President of the Board of Directors, and the Maintenance Supervisor and the heads of the contracted services report to her. The Employer's Maintenance Department currently includes Maintenance Supervisor David Meranus and Maintenance Technician Randy Mortimore.

## **II. RELEVANT CASE LAW**

### **A. Supervisory Status**

Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712 (2001); *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994). The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, supra. Any lack of evidence in the record is construed against the party asserting supervisory status. *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536, fn. 8 (1999).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The Board analyzes each case

in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. Evidence of the exercise of secondary indicia of supervisory authority is not sufficient to establish supervisory status in the absence of primary indicia. *First Western Building Services*, 309 NLRB 591, 603 (1992).

B. Revocation of Certification

The Board has stated that a single-employee unit is inappropriate under the Act because “the principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain.” *Foreign Car Center, Inc.*, 129 NLRB 319, 320 (1960). Thus, the Board will not conduct an election in a single-employee unit. *Mt. St. Joseph’s Home for Girls*, 229 NLRB 251, 252 (1977). Moreover, the Board will revoke the certification of a unit if there was only a single employee at the time of the election. *Virginia-Carolina Chemical Corp.*, 104 NLRB 69, 70 (1953). The Board will also revoke a Union’s certification, even if there was more than one employee at the time of the election, if the unit has been reduced to single employee after the election. *Sonoma-Marin Publishing Co.*, 172 NLRB 625, 626 (1969).<sup>2</sup>

Where a unit with several employees has been reduced to one employee, the employer has the burden of demonstrating that the reduction is permanent, not temporary. *Crescendo Broadcasting*, 217 NLRB 697 (1975); *Crispo Cake Cone Co.*, 190 NLRB 352, 354 (1971), *enfd.* 464 F.2d 233 (8th Cir. 1972). If the reduction in the unit size is only temporary, the Board will not find it to be a single employee unit. *Ibid.*

In determining whether the Employer has met its burden, the Board considers how the unit is staffed at the time the matter is litigated. *Sonoma-Marin Publishing*, *supra* at 626. In that case, there were three individuals in the unit at the time it was certified but only two when the collective-bargaining agreement expired. When the Board found that one of the two remaining employees was a supervisor, it held that the unit had become inappropriate.

The Board also considers the employer’s intention for the future employment of unit employees. Thus, in *Mt. St. Joseph’s Home for Girls*, *supra*, the Board, in finding the existence of a permanent single-employee unit, noted that there was only one employee in the unit and that the employer did not intend to employ more than one unit employee at a given time. In *Crescendo Broadcasting*, *supra*, the employer reduced its unit work force from two employees to one, but the Administrative Law Judge determined that the employer would have to hire an additional employee in order to run its radio station in compliance with certain FCC regulations. In reversing the conclusion that the unit had not permanently decreased to a single employee, the Board decided that the Judge had “erroneously substituted his own business judgment for that of Respondent” and found, based on an analysis of the record, that there was no reason the employer could not operate with only one unit employee. *Id.* at 697. See also *D & B Masonry*, 275 NLRB 1403, 1408-1409 (1985); *Paramount Liquor Co.*, 270 NLRB 339, 344 (1984).

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<sup>2</sup> It is not a violation of Section 8(a)(1) and (5) of the Act for an employer to refuse to bargain concerning a unit that has been reduced to a single employee after certification. *Liberty Ashes Inc.*, 314 NLRB 277, 281 (1994); *Oberle-Jordre Co.*, 271 NLRB 985, 993 (1984); *enfd.* 777 F.2d 1185 (6<sup>th</sup> Cir. 1985).

Section 11478.3 of the Board's Casehandling Manual (Part Two) Representation, gives the Regional Director the discretion to revoke a union's certification in appropriate circumstances.

### **III. FACTS**

On September 16, 2002, following a Board-conducted election, the Union was certified as the bargaining representative for the following unit:

Included: All full-time maintenance employees employed by the Employer at its Margate, New Jersey facility.

Excluded: All other employees, including office clericals, housekeeping employees, guards and supervisors as defined in the Act.

At the time of the certification there were three employees in the unit, Randy Mortimore, Christopher Goldsmith, and Joseph Gold.<sup>3</sup> Maintenance Supervisor David Meranus was not in the unit. After Gold left in the summer of 2002, he was not replaced. In May 2003, the Employer discharged Goldsmith. Mellow found it unnecessary to replace him based on the workload at the facility, and she testified that she has no plans to add any additional employees in the future.

The Maintenance Department employees take care of the common areas of the building. They maintain the facility's heating and cooling systems, check the boilers and swimming pool on a regularly scheduled basis, perform necessary repairs, and handle snow removal. The maintenance employees are also responsible for the electrical, mechanical, and plumbing systems in the individual units. Mortimore spends roughly 80% of his time fixing plumbing problems in residents' apartments.

Mortimore earns \$12.50 an hour and punches a time clock. He receives time-and-a-half pay for overtime, but he has not worked any overtime since Labor Day 2003. Mortimore works five days a week, eight hours a day, although his specific days off vary depending on the season and the Maintenance Supervisor's days off.

According to General Manager Mellow, Maintenance Supervisor Meranus has the authority to discipline and discharge Maintenance Technicians, as well as to approve requests for time off, schedule overtime, recommend raises, handle grievances and complaints, and to effectively recommend all of these actions. Mellow testified that she and Meranus jointly decided to terminate Goldsmith in 2003. Additionally, a few days before the hearing, Meranus informed Mellow that he wished to discharge Mortimore because of scheduling problems. Mellow spoke to both men and then told Meranus that he could make the decision. Meranus subsequently chose not to discharge Mortimore. Meranus assigns the Maintenance Department work after receiving a list of jobs from the main office, which is down the hall from his own

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<sup>3</sup> The three Maintenance Technicians were employed for several months in 2002, but generally, two Maintenance Technicians were employed prior to that time.

office. He is also involved in the budget process, and he prepares written reports for the Board of Directors and sometimes participates in its meetings. Meranus works five eight-hour days a week and is on call 24 hours a day. Mellow testified that he spends roughly 20% of his time performing hands-on work, but she did not know what he does the rest of the time. Meranus is a salaried employee who earns \$50,000 a year. Mortimore views him as his supervisor.

The Employer is in the process of performing \$5 million worth of renovations to its facility in order to improve the efficiency of its heating and cooling systems. The Board of Directors has retained an engineering company to assist in this process, and, at the time of the hearing, the Board of Directors was deciding between two plans offered by that company. According to Mellow, either of those two plans would require less maintenance work than is currently performed by the Maintenance Department.

The State of New Jersey has requirements regulating the staffing levels and training of individuals responsible for boilers. The Employer has a low-pressure boiler, which requires an operator to have a "Black Seal" license, and the Employer is required to have a licensed operator on site 24 hours a day, seven days a week. Meranus has a Black Seal license, while Mortimore has applied for one but has not yet received it. The Employer has been cited by the State for not meeting its staffing requirement.

During the week of March 30, 2004 the Employer ran a classified advertisement in a local newspaper, the Atlantic City Press, seeking "Maintenance Technicians." Mellow testified that despite the wording of the advertisement, the Employer was not seeking a Maintenance Technician but a Maintenance Supervisor. She stated that the Employer was looking to replace Meranus because the Board of Directors was displeased with him. She further testified that she believed she was likely to receive applications from the same pool of candidates whether she used the term "Maintenance Technician" or "Maintenance Supervisor" in the advertisement. Meranus was not discharged, however, but was told by the Board of Directors to improve his performance. Mellow interviewed about five applicants but did not hire anyone.

In June 2004, the Employer hired an employee named Preston (last name unknown) through a temporary agency and assigned him to paint lines in the parking lots, a task previously performed by unit employees. He has been employed for about 30 days. Preston does not wear a T-shirt that says "Margate Towers," as do Meranus and Mortimore. He uses painting supplies provided by the Employer but also has his own tools. He punches the same time clock as Mortimore.

Although the Union and the Employer engaged in contract negotiations, they did not execute a collective-bargaining agreement. The Employer did not inform the Union that the unit had been permanently reduced to a single employee prior to filing its request to revoke the Union's certification.

## IV. ANALYSIS AND CONCLUSIONS

### A. The Supervisory Status of the Maintenance Supervisor

Meranus was not a member of the bargaining unit at the time of the September 2002 election, and no party contends that he is in the unit now. The record indicates that Meranus has the authority to discharge employees. In this regard, Mellow recently told him to make the decision whether to retain Mortimore, and he and Mellow jointly decided to discharge former employee Goldsmith. Based on this indicium of supervisory status alone, he is a Section 2(11) supervisor. Meranus also has full responsibility to assign maintenance work once he receives a list of jobs from the main office. Additionally, Mellow testified without contradiction that Meranus has the authority to recommend raises, authorize overtime, and resolve grievances and complaints. He also possesses a number of significant secondary indicia of supervisory status: he is salaried, earning nearly twice as much as Mortimore; does not punch a time clock; has his own office; participates in Board of Directors meetings; and is viewed by Mortimore as his supervisor. I therefore find that Maintenance Supervisor Meranus is a supervisor within the meaning of the Act and should not be included in the unit. *Pepsi-Cola Co.*, 327 NLRB 1062, 1064 (1999).

### B. Revocation of the Union's Certification

There has been only one employee in the unit for more than a year, since May 2003, when Goldsmith was discharged. Mellow testified that, based on the facility's maintenance workload, the Employer has no plans to hire any additional unit employees.<sup>4</sup> In this connection, the Employer is renovating its heating and cooling systems and expects the changes to result in a decline in maintenance work.

The Union disputes that the unit has been permanently reduced to one employee for several reasons. First, the Union contends that the Employer will have to hire an additional employee to meet the State's boiler staffing requirement. The record does not support this contention, however, as Meranus has been the only licensed boiler operator for a long time, and there is no evidence that the Employer contemplates increasing its workforce. To conclude that the Employer needs to hire another boiler operator would be an improper substitution for the Employer's business judgment. Moreover, Mortimore is in the process of obtaining a Black Seal license, which will allow him, as well as Meranus, to oversee the boiler. See *Crescendo Broadcasting*, 217 NLRB 697 (1975). Compare *National Licorice Co.*, 85 NLRB 140 (1949) (Board finds employer contention that boiler room employee unit will be reduced in the future to one employee to be "mere speculation" and rejects argument that unit is inappropriate).

The Union next asserts that the Employer's newspaper advertisement for "Maintenance Technicians" indicated an intention to hire another unit employee in late March. However, Mellow testified that she sought to hire a replacement for the Maintenance Supervisor, whom she expected to be discharged, and there was no significance to the use of the Maintenance

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<sup>4</sup> Neither party argues that Preston, the employee hired through a temporary agency, should be part of the unit. In any case, as it appears that he has only been employed to complete the project of painting lines in the parking lot, I find that he should be excluded as a temporary employee. *Marian Medical Center*, 339 NLRB No. 23 (2003); *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982).

Technician title in the advertisement. In any case, Meranus was retained, no Maintenance Technician has been hired in the months since the Employer placed the advertisement, and only one employee remains in the unit. I therefore find that the Employer has met its burden of showing that the reduction to a single-employee unit is permanent and that the unit as currently certified is inappropriate. *Liberty Ashes, Inc.*, supra; *Mt. St. Joseph's Home for Girls*, supra; *Crescendo Broadcasting*, supra.

The Union asserts that even if it is found that there is a permanent single employee unit, its certification should not be revoked because the size of the unit could change at any time. This contention is without merit. Having concluded that the Employer has permanently reduced the unit to a single employee unit, it follows that there is no bargaining obligation on the Employer's part, and the bargaining relationship is thus terminated. The "bargaining relationship, once lawfully terminated, does not persist inchoate. It can only be reestablished through procedures recognized under Section 9(a) or 8(f)." *Kirkpatrick Electric Co.*, 314 NLRB 1047, fn. 3 (1994).

Accordingly, pursuant to Section 11378.3 of the Board's Casehandling Manual, I shall revoke the Union's certification. *Sonoma-Marin Publishing*, supra; *Virginia-Carolina Chemical Corp.*, supra.

## **V. ORDER**

As I have found that the certified bargaining unit has been permanently reduced to a single employee, the Certification of Representative in Case 4-RC-20486 should be, and it hereby is, revoked.

## **VI. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, and Section 11478.3 of the Board's Case Handling Manual for Representation Cases, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by E-mail. For details on how to file a request for review by E-mail, see <http://gpea.NLRB.gov/>. This request must be received by the Board in Washington by 5:00 p.m., EDT on **September 3, 2004**.

Signed: August 20, 2004

at Philadelphia, Pennsylvania

/s/ [Dorothy L. Moore-Duncan]  
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DOROTHY L. MOORE-DUNCAN  
Regional Director, Region Four